Supreme Court, U.S.
FILED
JUL 15 1996
CLERK

(3)

No. 95-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEILA JEANNE HILL, *et al.*, *Petitioners*,

v.

THE STATE OF COLORADO,
ROY ROMER, GOVERNOR, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals of the State of Colorado

REPLY TO BRIEF IN OPPOSITION

THOMAS P. MONAGHAN
NEW HOPE LIFE CENTER,
ACLJ—NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

KEITH A. FOURNIER
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23467
(804) 579-2489

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 304
Washington, DC 20007
(202) 337-2273

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

* *Counsel of Record*

Attorneys for Petitioners

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
REPLY ARGUMENT 2
I. RESPONDENTS FAIL TO EXPLAIN AWAY THE DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION STRIKING DOWN THE "NO APPROACH" ZONE IN *MADSEN* 2
II. THE BUBBLE ZONE STATUTE DOES NOT TARGET "FORCED COMMUNICATIONS," AS RESPONDENTS IMPLY, BUT DOES PROHIBIT THE PEACEFUL, NONVIOLENT EXPRESSION OF THE PETITIONERS 5
III. THE PRIOR RESTRAINT CREATED BY C.R.S. § 18-9-122(3) IS ENFORCED IN THE SAME WAY AS OTHER PRIOR RESTRAINTS CONSIDERED BY THIS COURT 7
IV. RESPONDENTS HAVE NOT DISPELLED THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THE EIGHT CIRCUIT AND THE NORTH DAKOTA SUPREME COURT 9
CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Cantwell v. Connecticut, 310 U.S. 305 (1940) 8
Cox v. Louisiana, 379 U.S. 536 (1965) 8
Edwards v. South Carolina, 372 U.S. 229 (1963) 1
Fargo Women's Health Organization, Inc. v. Lambs of Christ, 488 N.W.2d 401 (N.D. 1992) 9
Freedman v. Maryland, 380 U.S. 51 (1965) 8
Hague v. CIO, 307 U.S. 496 8
Kunz v. New York, 340 U.S. 290 (1951) 8
Madsen v. Women's Health Center, Inc. 512 U.S. ___, 114 S. Ct. 2516 (1994) ..... 2, *passim*
New York Times v. United States, 403 U.S. 713 (1971) ... 8
Niemotko v. Maryland, 340 U.S. 268 (1951) 8
Operation Rescue v. Women's Health Center, 626 So. 2d 664 (Fla. 1993) 3
Schenck v. Pro-Choice Network of Western New York, 64 U.S.L.W. 3623 (U.S. Mar. 15, 1996) (No. 95-1065) 1, 2
Schneider v. New Jersey, 308 U.S. 147 (1939) 9
Secretary of State of Md. v. Jos. H. Munson Co., 467 U.S. 947 (1984) 8
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 8
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 8
United Food and Commercial Worker's Int'l Union v. IBP, 857 F.2d 422 (8th Cir. 1988) 9

TABLE OF AUTHORITIES–(cont'd)

Page(s)

STATUTORY PROVISIONS

C.R.S. § 18-9-122 1
§ 18-9-122(2) 6
§ 18-9-122(3) ..... 1, *passim*
§ 18-9-122(4) 1

INTRODUCTION

The Colorado Bubble Zone Statute, C.R.S. § 18-9-122(3) (1995 Cum. Supp.),[1] is one of the most extreme impositions on orderly discourse in the public forum with which Petitioners and their counsel have ever been acquainted. That statute, which imposes a direct prohibition on leafletting, sign displays, and oral advocacy in the traditional public forum, directly abrogates the "exercise of . . . basic constitutional rights in their most pristine and classic form[.]" *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

In *Schenck v. Pro Choice Network of Western New York*, No. 95-1065, this Court has granted review to consider the constitutionality of a bubble zone imposed via injunction which allows the target of communication to cut off further speech by expressing the desire to be left alone. In Colorado, the Bubble Zone Statute prohibits all efforts at oral counseling, oral education, and oral protest, within eight feet of another person unless consent is first obtained. C.R.S. § 18-9-122(3).

Petitioners have urged this Court either to grant this Petition or to hold it pending a decision in *Schenck*. With an audacity not to be discounted, Respondents have determined — in advance of this Court's disposition of *Schenck* — that "resolution of the issues currently before the Court in *Schenck* will be of limited application here." Br. in Opp. at 14. At its base, that pronouncement by Respondents is of the same

---

1. As Respondents noted, "[t]he version of § 18-9-122 reprinted in the petition for writ of certiorari contained a typographical error . . . ." Br. in Opp. at 1. For the Court's convenience, the typographical error mentioned, but not identified, by Respondents was the unintentional omission of a comma following the word "section" in the excerpt of C.R.S. § 18-9-122(4), *see* Pet. at 3.

cloth as their utter rejection of this Court's directly applicable holding in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516, 2529 (1994), striking down an indistinguishable "consent to speak" requirement imposed by injunction. Respondents' advance declaration of disinterest in whatever holding this Court may make in *Schenck* only serves to underscore the importance of granting this Petition.

REPLY ARGUMENT

I. RESPONDENTS FAIL TO EXPLAIN AWAY THE DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION STRIKING DOWN THE "NO APPROACH" ZONE IN *MADSEN*.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2529 (1994), this Court struck down the provision of an injunction that barred enjoined parties from approaching others without their consent while within 300 feet of the medical facility involved in that case. 114 S. Ct. at 2522, 2529. That holding was unqualified.

Respondents tacitly concede that, subjected to the rigorous consideration applied in *Madsen* to the "no approach" zone, C.R.S. § 18-9-122(3) would not survive constitutional scrutiny. Br. in Opp. at 12-14. For this reason, Respondents ignore the direct holding on point in *Madsen*, 114 S. Ct. at 2529 ("[t]he 'consent' requirement alone invalidates this provision"). Instead, they argue that this Court's decision in *Madsen* is uninformative in the context of a challenge to a ***legislative*** act imposing a "consent" requirement.

Faced with the certainty of this Court's holding in *Madsen*, Respondents have lighted upon three possible distinctions between the Colorado Bubble Zone Statute and the "no approach" zone struck down *Madsen*. Those points of distinction are: (1) the sizes of the geographical areas within which the two provisions operate, Br. in Opp. at 12-13; (2) the sizes of the "bubbles" within those zones, *id.* at 13; (3) and, the difference between injunctions and statutes, *id.* at 7-8, 12. None of those points of distinction has merit.

A. In *Madsen*, 114 S. Ct. at 2529, this Court struck down an injunctive provision that prohibited those enjoined from

> At all times on all days, in an area within [300] feet of the Clinic, . . . physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners].

114 S. Ct. at 2522 (quoting *Operation Rescue v. Women's Health Center*, 626 So. 2d 664, 679-680 (Fla. 1993)). Thus, the "no consent" provision operated within 300 feet of the facility. Under C.R.S. § 18-9-122(3), the "consent" requirement operates within 100 feet of the entry door to a health care facility.

The size of the geographic zone within which the "no approach" zone operated was not a factor in this Court's constitutional analysis in *Madsen*. Rather than holding, as Respondents suggest, Br. in Opp. at 12-13, that it was the size of the 300 foot zone that compelled invalidation of the "no approach" provision, this Court focussed on a completely distinct issue: the requirement of consent. "The 'consent' requirement alone invalidate[d]" the "no approach"

provision. 114 S. Ct. at 2529. Respondents' attempt to distinguish *Madsen* by pointing to the difference in geographical size of the affected zones is unavailing.

B. In Respondents' view, this Court struck the "no approach" zone at issue in *Madsen*, at least in part, because of the size of the personal "no approach" bubble. *See* Br. in Opp. at 13 ("[t]his provision included no proximity requirement for the prohibited 'approach'"). But again, Respondents can only invoke *Madsen* by ignoring its directly controlling holding. Nothing in *Madsen* suggests that it was the size of the bubble zone that led to its invalidation. 114 S. Ct. at 2529. Rather, what this Court found dispositive of this question was the "'consent' requirement ***alone*** . . . ." *Id.* (emphasis added).

C. Ultimately, Respondents' argument is that the Bubble Zone Statute survives constitutional scrutiny because, unlike the injunctive "no approach" zone struck down in *Madsen*, the Bubble Zone emanated from an act of the legislative branch of government. Br. in Opp. 11, 12-14. Consequently, Respondents argue, the Bubble Zone Statute faces less rigorous analysis.[2] Even in this argument, Respondents can be seen running from the text and holding of *Madsen* that directly control the questions in this case.

This Court's uncomplicated holding

---

2. Of course, even in that argument, Respondents are mistaken. A less rigorous standard of review will not be applied to a generally applicable statute ***unless it is content-neutral***. *Madsen*, 114 S. Ct. at 2524. Here, the Colorado Bubble Zone Statute is manifestly not a content-neutral statute. *See* Pet. at 19-20.

"[t]he 'consent' requirement alone invalidates this provision . . . ,"

114 S. Ct. at 2529 (emphasis added), leaves no room to doubt whether peaceful exercises of the right to freedom of expression in the traditional public forum can be made subject to the whimsy of private anti-speech posses. "The 'consent' provision alone" invalidated the *Madsen* "no approach" zone, and only by rejecting or ignoring *Madsen* can Respondents and the court below fail to see that the same requirement of consent to speak invalidates C.R.S. § 18-9-122(3).

II. THE BUBBLE ZONE STATUTE DOES NOT TARGET "FORCED COMMUNICATIONS," AS RESPONDENTS IMPLY, BUT DOES PROHIBIT THE PEACEFUL, NONVIOLENT EXPRESSION OF THE PETITIONERS.

Respondents' clever but misleading use of quotation marks could lead one to the quite fallacious conclusion that the Bubble Zone Statute, C.R.S. § 18-9-122(3), simply prohibits "'forced proximity[,]'" Br. in Opp. at 4, and leaves the peaceful communicant to the unaffected exercise of fundamental constitutional rights. Two roadblocks stand between Respondents and their insupportable assertion: first, the Bubble Zone Statute does not even purport to be a regulation of the use of force or of proximity ***without communication***; and second, the Bubble Zone Statute does regulate peaceful, unobstructive expression.

The provision at issue in this litigation states:

> No person shall knowingly approach another person within eight feet of such person, unless such other person

> consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

C.R.S. § 18-9-122(3) (1995 Cum. Supp.).[3]

Conspicuously absent from this provision is any restriction on either proximity as such (whether forced or not) or the use of force in aid of communication. Nonetheless, Respondents repeatedly mischaracterize the Bubble Zone Statute in a manner suggesting that the Statute's scope is limited to the prevention of such force.[4] Although

---

3. Nothing in the record in this case nor in the record of the legislative hearing referred to by Respondents supports any imputation of unlawful, forceful, threatening or intimidating conduct to the Petitioners. Rather, as the trial court held, "[t]here is no question that the Plaintiffs['] conduct implicates First Amendment rights." Pet. App. at 12a. Petitioners do not use force or intimidation. *Id.* Consequently, Petitioners did not challenge a separate provision of Colorado law, enacted with the Colorado Bubble Zone Statute, which makes it a misdemeanor to "knowingly obstruct[], detain[], hinder[], impede[], or block[] another person's entry to or exit from a health care facility." C.R.S. § 18-9-122(2) (1995 Cum. Supp.). Rather, Petitioners have always contended that the legitimate interests of the government in securing access to medical facilities was better served by restrictions on obstructive and intimidating conduct, not on peaceful exercises of the right to freedom of speech.

4. *See* Br. in Opp. at 4 ("interfering with access through intimidating 'forced proximity'"); *id.* at 9 ("the threatening and intimidating close approach while engaging in these expressive activities . . . is targeted"); *id.* at 11 ("the statute eliminates the exact source of the

the Colorado Bubble Zone provision is barren of any restriction on the use of force or intimidation, it directly restricts paradigmatic expression: leafletting, sign displays, and oral advocacy — no matter how peaceful, no matter whether directed at patients or passersby — are all suppressed. The statute prohibits ***speech***, not forced proximity.[5]

III. THE PRIOR RESTRAINT CREATED BY C.R.S. § 18-9-122(3) IS ENFORCED IN THE SAME WAY AS OTHER PRIOR RESTRAINTS CONSIDERED BY THIS COURT.

Respondents dispute the application of the prior restraint doctrine to the consent requirement imposed by the Bubble Zone Statute, *see* Br. in Opp. at 14-16. Tellingly, Respondents do not deny that the statute plainly compels peaceful, nonviolent communicants in the traditional public forum to seek consent before engaging in protected expression. Respondents contend that the prior restraint doctrine is inapplicable because, unlike other prior restraints consider by this Court, the required consent must be gotten from ***private persons*** rather than ***public officials***.

Respondents' distinction is one without a constitutional difference. The constant theme of a prior restraint is that it

---

evil it was intended to remedy – focused, forced confrontations"); *id.* at 13 ("[a] focused, targeted approach by a stranger shouting slogans"); *id.* at 19 ("the statute specifically targets obstructive and threatening conduct entwined with speech"); *id.* at 21 ("citizens who wish to avoid being pursued, surrounded, and threatened by demonstrators").

5. Indeed, there is nothing in the Colorado Bubble Zone provision that outlaws forced proximity ***unless the person seeks to communicate***. A more direct penalization of free speech is difficult to imagine.

outlaws — and punishes — expression, no matter how peaceful, simply for lack of permission (whether from a licensor or from a court).[6] That Colorado has delegated licensing authority to passersby is no more relevant than if the City of Birmingham had required civil rights marchers to obtain permission from the owners of property adjoining the street in question.

Respondents also contended that because speech may still occur outside of the bubble zone, the zone is not a prior restraint. Br. in Opp. at 15. This Court has rejected the argument. *See Southeastern Promotions, Ltd.*, 420 U.S. at 556-57 n.8 ("[a] licensing system need not effect total suppression in order to create a prior restraint") (citing cases).

Respondents would have this Court countenance their unconstitutional licensing scheme because constitutionally protected rights may be exercised someplace else without a

---

6. *Cf. Secretary of State of Md. v. Jos. H. Munson Co.*, 467 U.S. 947, 804 (1984) ("fundraising activity illegal" absent compliance with charitable registration statute); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (use of the municipal auditorium without a permit); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (publication of national security information in violation of federal court order would be subject to contempt prosecution under Title 18 U.S.C. § 401); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (crime to parade without permit); *Freedman v. Maryland*, 380 U.S. 51 (1965) (crime to exhibit motion picture without a license); *Cox v. Louisiana*, 379 U.S. 536, 553-58 (1965) (crime to obstruct public passage unless permission obtained in advance from city officials); *Kunz v. New York*, 340 U.S. 290, 290-91 (1951) (crime to hold public meeting without a permit); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (unlicensed solicitations for religious, charitable and philanthropic causes "a crime"); *Hague v. CIO*, 307 U.S. 496, 502 n.1 (1939) (crime to parade or picket without permit).

need for consent. Again, this Court has long since rejected this argument: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The Bubble Zone Statute, however, operates in traditional public fora, *see* Pet. at 8, Pet. App. at 12a, the quintessential "appropriate places" for free speech.

IV. RESPONDENTS HAVE NOT DISPELLED THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THE EIGHT CIRCUIT AND THE NORTH DAKOTA SUPREME COURT.

Respondents have failed to dispel the existence of a direct conflict between the decision below and the decisions of the Eighth Circuit and of the North Dakota Supreme Court. *Pet.* at 25-27. Respondents ignore the functional similarity of the Bubble Zone Statute to the statute in *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988), and to the injunction in *Fargo Women's Health Organization v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Respondents' quibbling only serves to emphasize the need for this court to grant the petition and review the decision below, so that the growing constitutional confusion of the lower courts can be eliminated.

CONCLUSION

The petition should be granted.

Respectfully submitted,

THOMAS P. MONAGHAN
NEW HOPE LIFE CENTER,
ACLJ—NEW HOPE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020

KEITH A. FOURNIER
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23467
(804) 579-2489

* *Counsel of Record*

JAY ALAN SEKULOW *
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Thos. Jefferson St. NW
Suite 304
Washington, DC 20007
(202) 337-2273

ROGER W. WESTLUND
12000 N. Washington, # 207
Thornton, CO 80241
(303) 450-0833

Attorneys for Petitioners

July 15, 1996.